

**Letter of Findings Number: 04-20120183**  
**Sales/Use Tax**  
**For Tax Years 2001 through 2010**

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**ISSUE**

**I. Sales/Use Tax – Imposition – Exempt Jobs.**

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Rhoads v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); [45 IAC 2.2-3-9](#); [45 IAC 2.2-3-10](#); [45 IAC 2.2-3-12](#); [45 IAC 2.2-4-22](#); [45 IAC 2.2-4-23](#).

Taxpayer protests the Department's proposed assessments on certain purchases, claiming its customer was exempt from sales/use tax.

**STATEMENT OF FACTS**

Taxpayer is an out-of-state business, which sells and installs acoustic panels for customers in Indiana and outside of Indiana. Taxpayer bills its customers on a lump sum basis. Taxpayer did not file any Indiana sales/use tax returns.

In 2011, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer. The Department determined that the three-year statute of limitations does not apply to Taxpayer's purchases because Taxpayer is a non-filer of sales tax. The Department requested that Taxpayer provide its records for 2001 through 2010 tax years, but Taxpayer only provided the Department limited records for 2008, 2009, and 2010 tax years. Pursuant to the audit, the Department determined that, for tax year 2008, Taxpayer failed to pay sales tax or self-assess use tax on the materials it purchased and used to perform its installation at an Indiana customer's location. The audit then utilized the 2008 result to project Taxpayer's tax liabilities for 2001 through 2007 based on the best information available at the time of the audit. As a result, the Department assessed Taxpayer additional use tax and interest for tax years 2001 through 2008.

Taxpayer protested the Department's proposed assessment. An administrative hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

**I. Sales/Use Tax – Imposition – Exempt Jobs.**

**DISCUSSION**

The Department's audit determined that Taxpayer charged its customers on a lump sum basis; however, the Department found that, for tax year 2008, Taxpayer failed to pay sales/use tax on materials which it used in performing the installations in Indiana. Taxpayer claimed that it was not responsible for paying sales/use tax because the customer claimed that it was exempt from sales/use tax. Thus, Taxpayer believes that the Department's assessments were overstated.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoads v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. Id.; USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466, 468–69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. Id. A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for

consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a). [45 IAC 2.2-3-9](#), in relevant part, states:

(c) **A contractor has the burden of proof to establish exempt sale or use when construction material, which was acquired tax-free, is not subject to either the state gross retail or use tax upon disposition.**

(d) Disposition subject to the state gross retail tax. A contractor-retail merchant has the responsibility to collect the state gross retail tax and to remit such tax to the Department of Revenue whenever he disposes of any construction material in the following manner:

(1) Time and material contract. He converts the construction material into realty on land he does not own and states separately the cost for the construction material and the cost for the labor and other charges (only the gross proceeds from the sale of the construction materials are subject to tax), or

(2) Construction material sold over-the-counter. Over the counter sales of construction materials will be treated as exempt from the state gross retail tax only if the contractor receives a valid exemption certificate issued by the person for whom the construction is being performed or by the customer who purchases over-the-counter, or a direct pay permit issued by the customer who purchases over-the-counter.

(e) **Disposition subject to the use tax. With respect to construction materials a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner:**

(1) He converts the construction material into realty on land he owns and then sells the improved real estate;

(2) He utilizes the construction material for his own benefit; or

(3) **Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.**

(f) A disposition under C. [subsection (e)(3) of this section] will be exempt from the use tax **only if the contractor received a valid exemption certificate**, not a direct pay permit, **from the ultimate purchaser or recipient of the construction material (as converted), provided such person could have initially purchased such property exempt from the state gross retail tax. (Emphasis added).**

Thus, a "lump sum" contract is a contract for which all necessary materials and labor are performed for one specified price. In a lump sum contract, the customer is not charged sales tax; however, the construction contractor generally must pay sales tax or self-assess use tax on its purchase price for the materials. [45 IAC 2.2-3-9](#)(e)(3); [45 IAC 2.2-3-10](#)(3); [45 IAC 2.2-4-22](#)(e)(3); [45 IAC 2.2-4-23](#)(3).

Additionally, [45 IAC 2.2-3-12](#)(a) further explains that "[t]angible personal property purchased to become a part of an improvement to real estate under a contract with an organization entitled to exemption is eligible for exemption when purchased by the contractor."

In this instance, the Department's audit noted that Taxpayer charged its customer pursuant to a lump sum contract but did not pay sales tax or self-assess use tax on the materials it used to perform the lump sum contract. Taxpayer did not present any exemption certificate to the Department at the time of the audit. Thus, the audit properly assessed use tax.

At the hearing, Taxpayer asserted that it was not responsible for sales/use tax because its customer was exempt. Subsequently, Taxpayer submitted additional documentation including copies of the contract, invoices, and the customer's exemption certificate to support its protest. Upon reviewing Taxpayer's documentation, the Department agrees that Taxpayer has provided sufficient documentation to demonstrate that the following purchases for tax year 2008 were exempt.

Date	Reference	Amount
07/22/2008	2124460RI	\$23,122.00
07/28/2008	2129563RI	\$ 4,736.37
08/15/2008	2147518RI	\$12,265.52

Thus, the Department will recalculate Taxpayer's 2008 tax liability in a supplemental audit. Additionally, since the audit utilized the 2008 result to project Taxpayer's tax liabilities for tax year 2001 through 2007, the Department will also recalculate Taxpayer's 2001-2007 tax liabilities accordingly.

Taxpayer is reminded that sales/use tax becomes due at the time of purchase. If its customer claims an exemption, the exemption certificate should be obtained at the time the transaction occurs otherwise the burden of proving the transaction was exempt falls on Taxpayer and ultimately becomes measurably more difficult.

#### FINDING

Taxpayer's protest is sustained.

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